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Michael Fischl

University of Connecticut School of Law

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Ideology and Argument Construction in Contract Law

Richard Michael Fischl*

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I. Introduction

I've been invited to write about contract law and critical theory, a task that takes me back to my initial encounter with each in Duncan Kennedy's Contracts class a million years ago. Critical legal studies wasn't even a thing yet, and – at least to hear Grant Gilmore tell it – contract law hadn't been a thing for all that long either.¹ Kennedy was likewise new to the scene, up for tenure the year we had him. But the intersection in question was a central preoccupation of that extraordinary class and the focus as well of what was soon to emerge as one of the original critical legal studies, provoking several generations of work on ideology and argument construction in contract law and beyond.²

Much of that work has taken place in the law school classroom, where it all began for many of us. Indeed, the robust connection between pedagogy and legal theory was a staple of first-generation cls scholarship,³ and those who followed

* Professor of Law, University of Connecticut. Many thanks to Karl Klare for a generous and uncommonly insightful critique of an earlier draft; to the editors for including me in this important and engaging volume; and to Wolters Kluwer for graciously authorizing the use of considerable material from Richard Michael Fischl, *Teaching Law as a Vocation: Local 1330, Promissory Estoppel, and the Critical Tradition in Labour Scholarship*, 33 *International Journal of Comparative Labour Law and Industrial Relations* 145 (2017).

¹ Grant Gilmore, *Death of Contract* (1974).

² Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harvard Law Review* 1685 (1976).

³ Classics of the genre include Karl Klare, *Contracts Jurisprudence and the First-Year Casebook*, 54 *New York University Law Review* 876 (1979); Duncan Kennedy, *The Political Significance of*

mentors into the legal academy continued the effort with great enthusiasm.⁴ There is obviously a politics to foregrounding the classroom in one's scholarly work. Treating students as collaborators in the enterprise – taking their confusion or opposition seriously and recognizing their Emperor's New Clothes moments as a potential source of insight – reflects a commitment to 'eliminating illegitimate hierarchy' in the academic workplace (bet you haven't heard *that* expression in a while) and offers a critique-by-example of the use of the Socratic method to lord professorial expertise over charges who've been studying law for all of ten minutes. But it seems to me that the central link between pedagogy and theoretical work in the critical tradition lies in the relentless focus on the recurring rhetorical structures of legal justification, a 'demystification' project that produced enormously effective classroom teaching tools and at the same time exposed to a broader academic and professional audience the revealing patterns of thought lurking in the nooks and crannies of legal reasoning.

I will offer an extended illustration of the demystification link here and will focus on promissory estoppel, a doctrine that receives sustained attention in the typical US Contracts class and has been the focus of a great deal of scholarship, critical and otherwise, for decades. Following this introduction, the essay proceeds in two parts. In Part II, I introduce promissory estoppel the way I do in my classes, contrasting mainstream, legal realist, and critical 'stories' about the history and role of the doctrine in American contract law. I warn my students – as I am warning readers here – that the contrasting accounts are to some extent caricatures, for surely no self-respecting legal academic would actually *admit* to being 'mainstream,' and I gather from what I read in the casebooks as well as from discussions with others teaching the course that most of us bring insights from a mix of realist, critical, and other schools of thought to our classroom work. But the point of proceeding in this fashion is to attempt to highlight the

the Structure of the Law School Curriculum, 14 Seton Hall Law Review 1 (1983); Jay M. Feinman, Critical Approaches to Contract Law, 30 UCLA Law Review 829 (1983); Mary Joe Frug, Re-reading Contracts: A Feminist Analysis of a Contracts Casebook, 34 American University Law Review 1065 (1985).

⁴ See James Boyle, The Anatomy of a Torts Class, 34 American University Law Review 1003 (1985); Jennifer Jaff, Frame-Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning, 36 Journal of Legal Education 249 (1986); Jeremy Paul, A Bedtime Story, 74 Virginia Law Review 915 (1988).

contributions of the critical tradition to pedagogy as well as legal theory, and in Part III I'll bring those contributions to bear on a critical study of the Local 1330 case, a storied challenge to the closing of a pair of aging steel plants in the industrial Midwest nearly four decades ago.

II. Contracts Stories

A. The Mainstream Account

The mainstream story of promissory estoppel goes something like this. In the bad old days, promises were unenforceable unless supported by consideration, and under the so-called 'bargain theory' of consideration – developed in the latter part of the 19th century along with so many other heartless and cruel common law doctrines – a promise wasn't legally enforceable unless it was part of an exchange transaction. Thus, if you promised me a barrel of widgets and reneged on that promise, I had no legal recourse against you. Your promise was 'gratuitous,' and the point of bargain theory was to render such promises unenforceable. But if you promised me that same barrel of widgets in exchange for something I gave or committed to give in return – that is, for some sort of *quid pro quo* for the widgets – then your failure to make good on the promise was an actionable breach of contract.

Now most of the time the requirement of bargained-for consideration was not a problem, for in the commercial world the vast majority of transactions involve giving and getting on both sides: I work and for my efforts receive a salary and benefits; you sell a house and accept payment in return; etc. But in some commercial contexts, and in many familial, social, and charitable settings, people make promises with no expectation of receiving anything in return – apart, perhaps, from the pleasure of giving itself. So what happens if I make a promise – say I promise my sister-in-law a safe place to raise her family after the untimely death of her spouse, to take a not quite random example – but extract no 'price for the promise' in return?⁵

⁵ Readers who've been subjected to a first-year Contracts course in the US will no doubt recognize the reference to the facts of *Kirksey v. Kirksey*, 8 Ala. 131 (1845).

Far more often than not, what happens is that the promising party will make good on the commitment; fortunately for familial and other forms of social harmony, most people seem to keep most of their promises most of the time. And even if the promising party has second thoughts – where, for example, an ill-considered promise is made in a state of momentary exuberance or extreme grief – there may be no lasting problem if the second thoughts follow upon the first quickly enough.

But if the promising party reneges after the would-be beneficiary has pursued some costly course of action on the faith of the promise – say the grieving widow abandons her former home and moves her family many miles through dangerous terrain in order to take advantage of the promised place to live, only to find herself and her children out on the street a short while later – then the requirement of bargained-for consideration has bite, and the one who gets bitten is the widow or, more generally, the party seeking the law's assistance in holding the promising party to his word. The promise is gratuitous, the court would say; you gave nothing in return, so your mere reliance on the promise – no matter how much that reliance hurt – will not secure its enforcement.

In the mainstream account of American contract law, the requirement of bargained-for consideration was the 'majority rule' in the late 19th century, seemingly just another example of the preference for commerce over caring during an era very much in the thrall of Social Darwinism and *laissez faire*. But in our enlightened modernity, along to the rescue came promissory estoppel, the knight in shining armor sprung thus from the First Restatement of Contracts: 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'⁶ The notion of enforcing promises on the basis of reliance was of a piece with a broader movement toward the liberalization of contract law – as often as not in the service of widows, workers, and other vulnerable parties – and, during the ensuing half century, promissory estoppel smote the cold-hearted bargain theory in jurisdiction after jurisdiction, soon becoming a majority rule all of its own.

⁶ Restatement (First) of Contracts § 90 (1932).

B. The Realist Account

The legal realist version of the promissory estoppel story is a little different. Instead of a knight in shining armor, we get Dorothy Gale from Kansas, and she's had the ruby slippers all along. And in place of the mainstream account of liberalizing progress, it's a story of conflict between black-letter judicial pronouncements and the law 'on the ground.' In this account, we focus on the debates over the First Restatement, when the drafters – led by Samuel Williston, a/k/a Oz the Great and Powerful – were busy making the bargain theory of consideration the doctrinal centerpiece of their black-letter masterwork. They were not only enshrining it as an invariant requirement for the enforcement of promises but also using it to rationalize a host of other hoary doctrines, including the rules governing 'past' consideration (which infamously permitted a father to renege on a promise to pay for nursing care previously provided to his son by a good Samaritan⁷) as well as those governing mid-term contractual modifications (which likewise infamously permitted a ship's captain to renege on a promised raise for sailors forced to work with assertedly unserviceable fishing nets⁸).

And then along came Arthur Corbin, in the role of Toto pulling back the curtain to expose the Wizard's humbug. As legend has it, Corbin announced to his fellow Restaters that he'd found hundreds of American decisions in which courts had enforced promises with no bargain in sight – an intervention made all the more impressive by the absence in those days of photocopy machines let alone on-line research tools.⁹ Some of the cases hailed from jurisdictions that had yet to adopt bargain theory and continued instead to embrace the antecedent English 'benefit/detriment' test for consideration. Under that test, either a benefit

⁷ *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (1825).

⁸ *Alaska Packers Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902).

⁹ The account offered here of the respective roles played by Corbin and Williston follows the narrative made famous in Gilmore, *supra* note 1, at 62-63. Subsequent scholarship has called aspects of Gilmore's narrative into question, but even those critiques credit Corbin's work with exposing the considerable gap between bargain theory and then-existing caselaw. See James Gordley, *Enforcing Promises*, 83 *California Law Review* 547, 565-68 (1995); E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 *Michigan Law Review* 1406, 1454-62 (1986-87).

to the promisor or a detriment to the promisee would do the trick,¹⁰ and thus the widow's move or other reliance suffered on the faith of even a concededly gratuitous promise might well have secured legal protection by establishing consideration via the required detriment. In other cases Corbin brought to the debate, courts expanded longstanding legal doctrines in order to enforce gratuitous promises that induced detrimental reliance. Foremost among those was equitable estoppel, a device available then as well as now to protect a party's reliance on a misrepresentation of existing fact by 'holding the perp to his lie' – preventing (or 'estopping'), for example, a minor from pleading youth as a basis for avoiding contractual liability where he has misrepresented his age to a merchant. For some courts, it was a short leap from 'holding the perp to his lie' to 'holding the perp to his broken promise,' when it was a promise of future conduct – rather than a misrepresentation of existing fact – that had induced reliance by its would-be beneficiary.¹¹

Corbin's demonstration of a yawning gap between black-letter rules and 'the law on the ground' was part of a larger realist project that called into question the extent to which judges actually do what they *say* they are doing when they decide cases. That project was perhaps exemplified most dramatically by Karl Llewellyn's iconic analysis of the 'canons of construction,' which presented a lengthy list of frequently encountered and utterly noncontroversial judicial pronouncements about how courts should interpret statutes, each of them paired with a likewise frequently encountered and utterly noncontroversial trope that completely contradicted its twin. (Compare, for example, 'statutes in derogation of the common law shall be strictly construed' with 'remedial statutes shall be liberally construed' – bearing in mind that 'remedial' statutes almost invariably 'derogate' the very common law they are designed to 'remedy.'¹²)

As the realist story continues, Williston and his fellow drafters – who were committed, after all, to 'restating' the law of contracts – had no choice after Corbin's demonstration but to include a doctrinal mechanism for enforcing promises on the basis of reliance. As a result, in the First Restatement promissory

¹⁰ See *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891).

¹¹ See *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898).

¹² Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* 521-35 (1960).

estoppel took its place alongside consideration doctrine with no effort on the part of the drafters to explain how to square the bargain requirement with its seeming negation – at least where ‘injustice can be avoided only by enforcement of the promise’ – a few short provisions later. So the lesson we’re to draw from the realist account is this: Don’t take all those confident black-letter pronouncements too seriously, for we should pay as much attention to what courts actually *do* as we do to what they say. And what they do turns out to be messy and complicated, often more responsive to facts, equities, and social policies than to solemn professions of doctrinal entailment. In other words, we should pay a lot more attention to the *actions* of the man behind the curtain and a bit less to his sound and fury.

C. The Critical Account

1. Form and Substance in Contract Law

And what’s the critical version of the story? In a nutshell, critical scholars found order in all that decisional messiness, contending that the man behind the curtain wasn’t just randomly contradicting himself; rather, they argued, he was contradicting himself in recurring and hence revealing ways. And what the scholarship brought to the surface was the profoundly *ideological* dimension of legal analysis and argument. While most critical scholars would have wholeheartedly agreed with the realist insight that judicial professions of doctrinal entailment promise a bit more than they deliver, they nevertheless took the content of those professions seriously, mining the doctrinal material for hints, suggestions, and (with surprising frequency) forthright declarations of ideologically loaded assumptions and commitments. A principal critical lesson is thus that what courts *say* is very much a part of what courts *do* and that careful attention ought therefore be paid to the justificatory rhetoric of legal decisions as well as to decisional results.

Turning to promissory estoppel, Duncan Kennedy’s seminal critical study unearthed a persistent conflict between individualism and altruism in American law – individualism characterized by an ethic of private autonomy and a legal system devoted to the facilitation of self-interested exchange vs. altruism characterized by an ethic of solidarity and judges at the ready to protect the

vulnerable and powerless.¹³ On this account, the tension between bargain theory and promissory estoppel is neither a drafting anomaly nor a transitional stage in the steady march to enlightened liberalization, but instead merely an instance – albeit a telling and central instance – of a larger and abiding conflict. Thus, under bargain theory, private autonomy and self-interest are trump, and the reneging promisor needn't continue to provide the widow with a place to live since there's nothing in it for him. But under promissory estoppel, solidarity rules the roost, and we'll hold the cad to his word in order to protect a widow and family made vulnerable by reliance on his promise.

Focusing principally on contract law, Kennedy revealed this conflict at work in an extraordinary number of doctrinal contexts. But of even greater significance to our story was his further claim that there is a politics of legal form that corresponds to the politics of substantive conflict: a connection between individualism and a preference for governance via rigid rules (as in 'a party is free to exit a contract without further obligation if his trading partner's performance deviates in any respect from the terms of the parties' agreement'), and a corresponding connection between altruism and a preference for flexible, fact-sensitive standards (as in 'contractual exit isn't permitted once the trading partner has substantially performed'). Kennedy located the link between form and substance in the rhetorical conventions of legal contestation, noting for example the focus on self-reliance in the arguments for both rigid rules and individualist outcomes ('don't expect the state to rescue you from your own improvidence!') and the focus on sharing and sacrifice in the arguments for standards as well as altruist outcomes ('don't expect the state to permit you to enjoy a windfall at your trading partner's expense simply because her performance was imperfect in some minor respect!').

It is no coincidence, then, that bargain theory takes the form of a rule (a promise is binding if and only if there's a quid pro quo) and that promissory estoppel is the poster child for a flexible standard (a promise is binding if the promisor should "reasonably" expect reliance by the promisee and "injustice can be avoided only by its enforcement"). But the larger payoff is that the careful study of legal rhetoric – dismissed by many realists as the after-the-fact

¹³ Kennedy, *supra* note 2.

rationalization of results reached on unconscious or undisclosed grounds – could offer valuable insight into the role of ideological conflict in American law.

2. Taking Argument Seriously

And what were students to make of all this? My own experience – as a student of Kennedy and other first-generation cls scholars – was that critical teaching marked a vast improvement over what was going on in most of our other law school classes. And by the mid-1970s that was decidedly *not* legal realism, the lessons of which were typically reduced to sound-bites about the occasional role of policy in judicial decisions but otherwise ignored or dismissed with a glib reference to the contents of a judge's breakfast. Indeed, critical scholars revived and revitalized realist insights about the gap between the rhetoric of reasoning and decisional results, unearthing ideological contestation not only in legal doctrine but also in the analysis of facts, equities, and social policies that realists had offered in their effort to explain the law 'on the ground.'

For those of us who entered the legal academy during that heady time, exploring patterned conflict in every darkened corner of legal analysis became a principal frame for the use of theory in the classroom, a practice some of us continue to this day. We offer it not for its own sake nor in order to demonstrate our chops with fancy philosophical concepts and jargon – great fun though that may be – but instead as a tool of *demystification*, of unveiling the law's politics while at the same time recasting those otherwise seemingly random invocations of fact sensitivity, situational equities, and social policy as an integral part of the law rather than as the occasional handiwork of a rogue or dyspeptic judge.

Paired Arguments. In my own classes, for example, we explore the ways in which ideological conflict frames not only the choice of legal rules but also the application of rules in particular cases. To continue the widow's saga, let's say the governing jurisdiction has a robust body of caselaw embracing the use of promissory estoppel in situations involving unbargained-for reliance, so there's not much doubt that a court will apply promissory estoppel instead of bargain theory in the widow's case. But as any victim of the Socratic method will tell you, this doesn't mean a sure win for the widow, for the lawyers on each side still have plenty to argue about.

Thus, familiar conflicts will likely emerge over how to interpret the facts, with one side emphasizing the ‘four corners’ of the brother-in-law’s promise (he never said the widow could stay ‘forever’) and the other emphasizing the widow’s ‘reasonable expectations’ (but the promising party is her deceased husband’s brother whom she should surely be able to trust, and he’s offered the widowed mother of his brother’s children ‘a place to raise her family’); how to balance the equities, with one side emphasizing the point of view of the put-upon promisor (he’s doing all the giving and getting nothing in return) and the other emphasizing the plight of the relying promisee (but the widow and her children moved many miles over difficult terrain on the faith of his promise, and they no longer have a home to return to if the eviction stands); and how to further sound social policy, with one side contending that promises should be narrowly construed lest folks be reluctant to make them and the other contending that promises should be broadly construed lest folks be reluctant to rely on them.

Nesting. If I’m doing my job well, my students soon learn to recognize and even anticipate these and many other ‘paired arguments’ on their own.¹⁴ With the aid of some Socratic prodding, my students may also begin to discern the outlines of a larger pattern that frequently frames the deployment of the argument pairs they encounter: Conflict over the *application* of a legal rule often recapitulates the conflict attending the *choice* of that rule in the first place. To continue with the widow’s case, bargain theory may have ‘lost’ out as the governing rule of the jurisdiction in cases involving unbargained-for reliance, but it lives to fight another day as lawyers and judges contend over the application of promissory estoppel to particular facts. Thus, note that each of the ‘against the widow’ arguments rehearsed in the previous paragraph emphasizes the threat to the brother-in-law’s freedom and/or the absence of an exchange relation and thus draws on the individualistic underpinnings of bargain theory itself. Likewise, each of the ‘pro-widow’ arguments highlights the vulnerability that results from

¹⁴ Most of them eventually figure out that a book on legal reasoning and law exams co-authored and shamelessly promoted by their professor can be of considerable assistance in this endeavor. See Richard Michael Fischl and Jeremy Paul, *Getting to Maybe: How to Excel on Law School Exams* (Carolina Academic Press 1999), which builds on the cls ‘legal semiotics’ work cited supra at notes 3 & 4.

her reliance on her brother-in-law's promise and thus draws on the solidaristic underpinnings of promissory estoppel. The fancy name for this pattern – in which seemingly settled arguments re-emerge again and again at other levels of analysis – is 'nesting,' a phenomenon that is as familiar in contemporary political stalemates as it is in American legal reasoning.

Framing. But the ideological character of law doesn't stop there. A further insight of critical scholarship is that ideology not only organizes and permeates the arguments lawyers and judges routinely deploy but also helps to shape the way legal decisionmakers *think* about and come to understand legal issues and disputes. Consider one more time the widow's case and yet another rhetorical pattern that is evident in the arguments posed on each side. Note that the arguments against the widow focus intensely on the brother-in-law's promise, carefully delimiting its precise terms and emphasizing the absence of anything sought in return. By contrast, the arguments in the widow's favor treat the promise as merely a starting point for analysis and focus more broadly on the context of the promise-making and on the events that follow.

In class, I describe these contrasting approaches as 'the snapshot vs. the film,' and it's easy to see how they might emerge from the competing world-views associated respectively with individualism and bargain theory (on the one hand) vs. altruism and promissory estoppel (on the other). To someone in the thrall of the former, virtually everything a legal decisionmaker needs to know can be captured at the moment of promising – either something is sought in exchange for the promise or it's not, and at all events any restriction on a promisor's freedom is strictly limited by the precise terms of his freely made promise. To someone of the opposing bent, the analysis certainly takes the promise into account but treats it as simply one event occurring within a larger narrative of the promisee's susceptibility to the promisor's lure and the life decisions she proceeds to take on the faith of his assurances.

Of course these competing approaches to the framing of facts can be deployed instrumentally. If you're a lawyer representing the brother-in-law – or a judge inclined to rule in his favor – you would be wise to emphasize 'the snapshot' (since those are the facts that favor his case) rather than 'the film' (since those facts tug the other way), and the reverse is naturally true of the widow's lawyer or a judge sympathetic to her cause. But the argument here is that these competing conceptions of contractual obligation can also influence and shape the

way a dispute is *understood* by legal actors, operating as a powerful heuristic through which lawyers arguing a case – and judges deciding it – may come to decide what counts as a legally relevant fact and what feels like a compelling story.

Flipping. One might assume from the discussion thus far that the critical take follows the mainstream and realist accounts in treating promissory estoppel as the ‘hero’ and bargained-for consideration as the ‘villain,’ and that is indeed often the case: promissory estoppel has frequently come to the rescue of widows, workers, and other vulnerable parties left out in the cold by bargain theory. But in much the same way that ‘wins’ at the choice-of-rule level can turn into ‘losses’ during rule-application, the choice of rule can itself have unintended consequences, and advocates should be careful what they wish for. If today consideration doctrine thwarts the effort of workers to modify their employment contracts to secure additional pay for unexpectedly difficult work,¹⁵ tomorrow they might deploy the doctrine in their favor and resist contractual modifications by an employer seeking to eliminate previously promised job security.¹⁶ And if today promissory estoppel might come to the aid of the widow Kirksey in her efforts to house her children, tomorrow it might be deployed in an effort to force her to give up a child she has brought to term.¹⁷ We call this ‘flipping’ – using a rule against its seemingly natural beneficiary – and lawyers who succeed in the maneuver are likely to enjoy the double entendre almost as much as the win.

Form and Substance Redux: Individualism and Formalism Reloaded. So how has the larger conflict between solidarity and self-regard fared in the intervening decades? The individualism Kennedy described in the mid-1970s was a chastened one, bloodied and even bowed a bit by the realist critique. Reluctant to proclaim the moral primacy of naked self-interest – a heavy lift in a culture venerating Mother Teresa as the paragon of virtue – its partisans hedged their bets by invoking the invisible hand (‘selfishness in service of the public good’) or defending individualism with ‘clenched teeth’, acknowledging its moral

¹⁵ See *Alaska Packers Ass’n v. Domenico*, 117 F. 99 (9th Cir. 1902)(the ‘sorry about the fishing nets but kidding about that raise’ case).

¹⁶ See *Torosyan v. Boehringer Ingelheim Pharmacy*, 234 Conn. 1, 13-17 (1995).

¹⁷ See Brown C. Lewis, *Due Date: Enforcing Surrogacy Promises in the Best Interests of the Child*, 87 St. John’s Law Review 899, 940-42 (2013).

deficiencies but contending that efforts to suppress it via the legal system would lead to greater evils still.¹⁸

Needless to say, contemporary individualism seems to have ‘gotten over’ realism as well as apologetics, exuding a muscular moral confidence and worshipping at the neoliberal altar of freedom of choice. (Workers of the world unite: we are all consumers now.) By contrast, altruism has been humbled by an extended encounter with law and economics, frequently reduced to the role of addressing market imperfections – instances of market access and information barriers, collective action problems, toxic externalities, transaction costs and the like – in order to fend off a nigh hegemonic deregulatory agenda with a pitch for modest ‘win-win’ interventions and ‘regulation lite.’¹⁹

Against this backdrop, it’s no surprise that promissory estoppel has been taken down a notch, with partisans of individualism proclaiming ‘the death of reliance’ and the relegation of the doctrine to a market-serving role.²⁰ To be sure, the celebration may be somewhat premature. As a distinguished defender of the older order demonstrated in a careful study of what American courts are actually *doing* in promissory estoppel cases, reliance remains crucial to recovery, yet even he conceded that estoppel claims face an uphill battle in most courts.²¹

A similar development is evident in the contemporary politics of rules and standards, the neoformalist dimension of this neoliberal moment. In Kennedy’s account – and as the realists demonstrated – formalism was often a mug’s game as rules promised more predictability and constraint than they could deliver, partly a result of proliferating counter-rules and exceptions and partly because judges were unwilling to ‘bite the bullet’ when a particular rule’s under- or over-inclusion would lead to manifest unfairness.²² But today the shoe is on the other

¹⁸ Kennedy, *supra* note 2, at 1716.

¹⁹ See Richard Michael Fischl, *Efficiency and Its Discontents*, *Jurisprudence: An International Journal of Legal and Political Thought* (forthcoming 2018).

²⁰ See Randy Barnett, *The Death of Reliance*, 46 *Journal of Legal Education* 518 (1996); Nathan B. Oman, *The Dignity of Commerce* (U. Chicago 2017).

²¹ Robert A. Hillman, *Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study*, 98 *Columbia Law Review* 580, 619 (1998).

²² Kennedy, *supra* note 2, at 1700-01.

foot, and it is extraordinary how often standards crafted to post-realist tastes get ‘rule-i-fied’ into a rigid repertoire of constituent elements.

Promissory estoppel is again a case in point. Virtually any analysis of the doctrine’s application to a particular dispute is likely to begin with a rote recitation of ‘elements’ that must be satisfied for a claim to succeed: (1) a promise; (2) a reasonable expectation of reliance on the part of the promisor; (3) reliance-in-fact by the promisee; and (4) a showing that injustice can be avoided only by enforcement of the promise.²³ Predictably, this has prompted many courts to adopt a ‘checklist’ approach to decisionmaking – examining each of the elements in isolation and thus ignoring the forest in a search for individual trees – though once again there are cases and commentary to the contrary.²⁴

3. The Taken-for-Granted, the Trump, and the ‘Tells’

The argumentative techniques described in the previous section suggest a great deal of ‘play in the joints’ in legal reasoning. The fancy term for this is ‘indeterminacy,’ the notion that (some, many, most, all?) cases might be decided ‘either way’ despite the ritual declarations of doctrinal constraint by American judges. Yet there is a competing tradition of critical work that takes those declarations seriously, searching them for hints of what is ‘taken for granted’ by decisionmakers, assumptions so deeply ingrained in American legal thinking that they may trump more conventional sources of law in what passes for reasoning and analysis. Examples abound, and seasoned observers learn to recognize the ‘tells’: when, for example, a court introduces a proposition reeking of race, gender, or class bias with an ‘of course,’ a ‘clearly,’ or similar language designed to assure the reader that what follows is *so incredibly obvious* it needs neither authoritative nor evidentiary support²⁵; or bases the resolution of a

²³ See E. Allan Farnsworth, Contracts § 2.19 (4th ed. 2004).

²⁴ See Jay M. Feinman, The Last Promissory Estoppel Article, 61 Fordham Law Review 303 (1992)(critiquing judicial and scholarly treatment of promise and reliance as discrete elements detached from the context of the parties’ relationship); for contrasting cases illustrating the point, see footnotes XXX-XXX *infra* and accompanying text.

²⁵ See *Teamsters v. Daniel*, 439 U.S. 551, 560 (1979)(emphasis added), rejecting the argument that employee pension plans are investments protected by federal securities law:

factual dispute on a cringeworthy economic analysis parading as a dispassionate evaluation of the evidence²⁶; or runs roughshod over statutory text, legislative history, and precedent as it confidently reaffirms existing relations of power (merchants over consumers, capital over labor, racial domination, patriarchy, hetero-normativity, etc.).²⁷ In such cases, the reader can be forgiven for suspecting that something other than random error is at work and that ideological commitments are shaping what passes for ‘common sense’ among legal thinkers. You could fill books and book-length articles with tales of ideologically charged assumptions exerting their influence on various areas of

Only in the most abstract sense may it be said that an employee “exchanges” some portion of his labor in return for [his pension plan]. . . . His decision to accept and retain covered employment may have only an attenuated relationship, if any, to perceived investment possibilities of a future pension. Looking at the economic realities, *it seems clear that an employee is selling his labor primarily to obtain a livelihood, not making an investment.*

²⁶ See *Domenico v. Alaska Packers Ass’n*, 112 F. 554, 556 (N.D. Cal. 1901), *aff’d*, 117 F. 99 (9th Cir. 1902)(once again the ‘sorry about the fishing nets but kidding about that raise’ case):

The contention of [the sailors] that the nets provided them were rotten and unserviceable is not sustained by the evidence. The [employer’s] interest required that [the sailors] should be provided with every facility necessary to their success as fishermen, for on such success depended the profits [the employer] would be able to realize that season from its packing plant, and the large capital invested therein. In view of this self-evident fact, it is highly improbable that the [employer] gave [the sailors] rotten and unserviceable nets with which to fish.

²⁷ Compare *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (enforcing fine-print terms of document first encountered by consumer upon opening a shrink-wrapped shipping carton containing goods consumer had already paid for) with the express language of U.C.C. § 2-206(1)(b) (under which the deal would have been closed – and the contract fully formed – no later than the moment the merchant shipped the goods); the express language of U.C.C. § 2-207(2) (under which the fine-print terms of the merchant’s ‘late hit’ would have constituted mere ‘proposals’ that the consumer was free to reject); and Official Comment # 1 to the latter provision (which states that § 2-207 governs transactions involving a single form, contrary to the court’s citation-free assertion that the provision is ‘irrelevant’ to shrink-wrap transactions since ‘there is only one form’).

American law, and critical scholars have been developing a rich body of work doing just that since the dawn of the movement.²⁸

* * * * *

So what did the insights of critical legal studies mean to those of us who came to law school eager to use the law for social justice work? That depended a lot on what you wanted from the law. If you were looking for a sure bet in the service of progressive transformation, you were in serious trouble. In Dorothy's immortal words, there was nothing in that little black bag for you – no invincible argument in the Constitution, the common law, or anywhere else you could count on to get you where you wanted to go.

But if you wanted to *understand* the law – to move beyond the mainstream myths of liberalizing progress and 'just doin' my job ma'am' doctrine-crunching – it seemed like you'd come to the right place. As you prepared for law practice, the relentless revelation of argument-pairs and larger structures of ideological conflict went some distance to diminish the sense that the law was hopelessly stacked against the good and the true. You learned that there was a lot of 'deviant' doctrine out there – that hidden in the maze of legal argument there was solidarity as well as self-regard, a legacy of regulation as well as laissez-faire. There was, in other words, the thrill of mastering the master's tools and sometimes the master himself, for it was often possible – with the help of hard work, creative energy, and a wee bit of luck – to develop a counterargument that might find some purchase and do some good.

Developing a keen eye for the 'taken for granted' and an appreciation for its influence was enormously useful as well, offering more than occasional glimpses of the law's otherwise hidden argumentative terrain. To be sure, an extended encounter with that terrain was seldom a cause for celebration. But to recall the

²⁸ For classics of the genre, see Karl Klare, *The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 *Minnesota Law Review* 265 (1978); Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *Minnesota Law Review* 1049 (1978); Fran Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harvard Law Review* 1497 (1983).

mantra of untenured critical scholars during the anti-clas backlash of the 1980s, at least it meant you would ‘never underestimate the danger you are in.’ Yet a clear-eyed understanding of the law’s politics was not inevitably a downer, for there were emancipatory possibilities as well. For one thing, it was liberating (even sanity-preserving) to vindicate the intuition that law *had* a politics, countering the persistent mainstream myth that law and politics were distinct and dichotomous phenomena. For another, there was the prospect that exposing the exercise of power behind the pretensions of constraint and necessity – much as Toto tugged back the curtain to reveal the Wizard as an ordinary man – might embarrass power’s apologists into a day of reckoning or even a change of course.

III. Promissory Estoppel and *Local 1330*: A Critical Study

A. The case

The value of critical methodology is best assessed by seeing it in action, and thus I’ll conclude the chapter with an examination of an illustrative case: *Local 1330 v U.S. Steel*, a tragically unsuccessful effort in the late 1970s to prevent the closing of two aging steel plants in the industrial Midwest.²⁹ I’ve chosen the case for a number of reasons. For one thing, inspired by a most engaging conference a few years back, I have resumed teaching the case in my courses and had recent occasion to put some thoughts about it to writing.³⁰ For another, the case represents a nodal point in American history, a harbinger of late twentieth century deindustrialization as well as of the declining fortunes of labour unions and the ‘rust belt’ workers they represented, developments explored with alarm by progressive economists and legal scholars several decades before the 2016 US

²⁹ *Steelworkers Union, Local No. 1330 v. U.S. Steel Corp.*, 492 F. Supp. 1 (N.D. Ohio E.D. 1980), *aff’d* *Local 1330, Steelworkers Union v. U.S. Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980).

³⁰ See *Local 1330 v. U.S. Steel: 30 Years Later* (Harvard Law School, Feb. 25, 2011), proceedings available at <http://legaleleft.org/conferences/local-1330-conference/>; Fischl, Teaching Law as a Vocation, *supra* note *.

presidential election brought them forcefully to forefront of American politics.³¹ And for still another, the case turns out to have been an early symptom of the neoliberal/neoformalist turn described earlier.

The case was filed against U.S. Steel, the plants' owner, by union locals ('the union', for ease of expression) representing some 3500 affected employees. The action sought to enjoin the threatened closure via promissory estoppel, contending that the employer had broken its promise to keep the plants open if the workers redoubled their production efforts and succeeded in making the plants 'profitable.' In the litigation that ensued, there was little dispute that the workers had accomplished and indeed sacrificed a great deal on the faith of that promise, but in the end the courts rejected their claim on the basis of a finding that the effort had fallen short of the 'profitability' benchmark.³²

The profitability issue was hotly disputed by the parties. For its part, the union took its evidence straight from the horse's mouth, citing repeated representations by company officials – from the superintendent of the doomed plants to the chair of the company's board of directors – that profitability had indeed been achieved at the plants, and that company representatives made this point repeatedly in communications to the workers as well as in various statements to the press.³³ At trial, the company argued that the profitability claim was accurate only with respect to the fixed costs of operating the plants and did not take into account a fair allocation of company-wide purchasing, sales, and management expenses. When the latter were included in the calculus, officials claimed, the plants were operating at a loss despite the many contemporaneous public declarations to the contrary.³⁴

In the end, both the district court and the court of appeals embraced the definition of profitability U.S. Steel asserted at trial, though the courts offered differing rationales for doing so. The district court treated the profitability benchmark as a 'condition precedent' to liability under promissory estoppel and

³¹ See Barry Bluestone & Bennett Harrison, *The Deindustrialization of America* (Basic Books 1984); Joseph William Singer, *The Reliance Interest in Property Law*, 40 *Stanford Law Review* 611 (1988).

³² 492 F. Supp. at 3-8; 631 F.2d at 1269-79.

³³ 631 F.2d at 1272-74.

³⁴ *Id.* at 1279.

concluded that the union had failed to overcome the company's showing.³⁵ The appellate court steered clear of the lower court's 'condition precedent' analysis, reasoning instead that it was unreasonable for the workers to read the union's version of profitability into the company's promise.³⁶ But the courts were very much on the same page with respect to the tragedy at hand, the district court lamenting that U.S. Steel 'should not be permitted to leave the Youngstown area devastated after drawing from the lifeblood of the community for so many years',³⁷ and the appellate court describing the situation as an 'an economic tragedy of major proportion' and a 'devastating blow' to the employees as well as the Youngstown community.³⁸

B. Critique

1. The path not taken

A central lesson of the 'critical legal history' of promissory estoppel is the tension between the ethic of solidarity and mutual dependence reflected in that doctrine (on the one hand) and the ethic of private autonomy and individual self-interest reflected in the bargain theory of consideration (on the other). Thus, when a court treats promissory estoppel as the governing rule – as did both the district court and the court of appeals in *Local 1330* – solidarity has seemingly won the day. But if the union thus enjoyed the legal equivalent of 'the home field advantage', why didn't it go on to succeed with its claim? As suggested earlier, an important insight of critical work is that the choice of the governing rule frequently marks just the beginning rather than the end of conflict and that the application of the chosen rule to the facts of a particular case presents an occasion to fight that fight again. As it happens, *Local 1330* offers a striking example of this phenomenon.

³⁵ 492 F. Supp. at 7.

³⁶ 631 F. 2d at 1279.

³⁷ 492 F. Supp. at 9.

³⁸ Id. at 1265.

Let's begin with a close examination of the reasoning offered by the courts in support of the result, and at this point we'll focus on the court of appeals since it had the final and authoritative say. Thus, the appellate court began its analysis by asserting that 'the profitability issue in the case depends in large part upon definition' and went on to critique the union's version for failing to account for company-wide expenses fairly allocable to the Youngstown operation.³⁹ 'Obviously,' the court observed, 'any multiplant corporation could quickly go bankrupt if such a definition of profit was employed generally and over any period of time.'⁴⁰ The court's analysis continued:

Plaintiffs point out, however, that this version of Youngstown profitability was employed by the Youngstown management in setting a goal for its employees and in statements which described achieving that goal. The standard of Restatement (Second) of Contracts § 90, upon which plaintiffs-appellants rely, however, is one of *reasonable expectability of the "promise" detrimentally relied upon*. The District Judge did not find, nor can we, that reliance upon a promise to keep these plants open on the basis of coverage of plant fixed costs was within reasonable expectability. We cannot hold that the District Judge erred legally or was "clearly erroneous" in his fact finding when he held that the "promise" to keep the plants open had to be read in the context of normal corporate profit accounting and that profitability had not been achieved.⁴¹

The court thus acknowledged that the union's definition of profitability was the version embraced by U.S. Steel in contemporaneous public statements but dismissed that fact as irrelevant to its 'reasonable expectability of the "promise"' test. Exactly *why* the statements of company officials to the workers had no bearing on 'reasonable expectability' is not explained, though the clumsy formulation is notable for its erasure of speaker and spoken-to alike. The court thus evidently viewed 'expectability' as a quality inhering in 'the "promise"', and, together with those scare quotes, this suggests a focus on the promise *in and of itself*. There is caselaw supporting this approach, which is consistent with what I described earlier as the neoformalist tendency to 'rule-i-fy' standards by

³⁹ Id. at 1279.

⁴⁰ Id.

⁴¹ Id. (emphasis added).

analyzing the constituent elements in isolation from one another.⁴² And when the inquiry is framed that way – severed from parties and context – it is no surprise that ‘profitability’ might be read through the lens of ‘normal corporate profit accounting’ and that events extrinsic to its making (like the repeated assurances that the benchmark had been met) would be ignored as beside the point.

Students who have begun to master the hunt for ‘paired arguments’ will recognize the move the court has made here – focusing like a laser beam on the ‘four corners’ of the promise – and begin the search for its missing rhetorical twin, the ‘reasonable expectations’ of the parties, as we saw during our imagined re-litigation of *Kirksey* (“I didn’t promise she could stay *forever!*” vs. “He’s my dead husband’s brother, and he assured me of a place to ‘raise my family!’”). As it happens, the twin can without much difficulty be found in the relevant legal materials. The court’s ‘reasonable expectability’ formulation offers a nod in that direction, though it is (again) treated as a quality of the promise, while the text of § 90 focuses instead on the ‘reasonable expectations’ of the parties and specifically on the expectations of the promising party regarding the likely effect of the promise on the promisee. The language of the provision can thus be read to ask not how the promise should be read in isolation and by some disinterested third party – let alone by a ‘corporate accountant’, normal or otherwise – but instead how the real-world promisor should reasonably expect the real-world promisees to understand it and respond.

Turning back our case, once we bring our particular promisor’s expectations about likely reliance into the picture, it is hard to dispute that U.S. Steel should have expected its workers to believe precisely what company officials had repeatedly told them to believe – that the plants were once again profitable – right up to the moment the parties headed for court. Nor is there any suggestion in the text of § 90 that inquiry should be limited to the promisor’s expectations at

⁴² See *Prenger v. Baumhoer*, 939 S.W. 2d 23, 27-28 (Mo. App. 1997) (rejecting argument that promissory estoppel claim should focus primarily on ‘how the promise relates to “its ability to provoke reliance” rather than just the promise in isolation’ and basing the analysis instead ‘on the alleged promise itself’).

the moment the promise is made, and there is caselaw on this side of the issue as well.⁴³

Note that the ‘four corners of the promise’ vs. ‘reasonable expectations’ standoff presents a classic example of argument ‘nesting’ as well. If bargain theory lost the ‘choice of governing rule’ debate with promissory estoppel, it nevertheless lived to fight another day in the application of the supposed winner to the facts of *Local 1330*. Thus, if the union’s argument was all about the reliance generated by the company’s promises, the company focused instead on the price it exacted for the continued operation of the mill and resisted enforcement because it did not in the end get what it sought in return (dare we say ‘bargained for’?): profitability.

We can likewise see how these opposed legal theories ‘framed’ the parties’ contrasting presentations of the case. The company’s pitch enabled it to ‘stop the action’ at the moment of promising and offer a ‘close-up’ of the promise itself. If this sounds a bit like what we described earlier as the ‘snapshot,’ then the union’s contrasting account offers ‘the film,’ bringing the story of the workers’ reliance into sharp relief and revealing the role that the company’s assurances of profitability played in its sustained effort to induce its workers to rely to the hilt.

To put it another way, the union’s ‘film’ focused on what the word ‘profitable’ *did*, whereas the company’s ‘snapshot’ focused on what the word ‘profitable’ *meant*. Thus, the court took a ‘deep dive’ into the language of the company’s promise, and, in the abstract, it is difficult to argue with the logic that ‘any multiplant corporation could quickly go bankrupt’ if apportioned company-wide expenses were not taken into account in determining the profitability of an individual plant.

But it demeans the Youngstown workers to suggest – as did the court of appeals, the company, and not a few contemporaneous commentators – that their expectations were the product of a naïve and homespun failure to come to grips with the rules of ‘normal corporate profit accounting’ when those expectations were in fact shaped by the public proclamations of company officials that the redoubled productivity effort was succeeding and that the plants were once again profitable. The assurances of profitability were thus an

⁴³ See *Ulrich v. Goodyear Tire Co.*, 792 F. Supp. 1074, 1081-82 (N.D. Ohio 1991) (post-promise events relevant to reasonableness of promisee reliance).

integral part of the promising, deployed for precisely the same purpose, and to precisely the same effect, as the initial round of promises: As part of a calculated effort to boost the workers' morale and induce them to continue their sacrifices and redoubled efforts right up to the last possible moment.

2. Here be dragons

If cogent legal arguments might thus have justified an outcome in the union's favor, why did those arguments fail to persuade judges otherwise so seemingly sympathetic with the workers' plight? We have been focusing thus far on the opinion of the court of appeals, but a close look at the district court's handiwork may be revealing in this respect. It will be recalled that the lower court treated the profitability benchmark as a 'condition precedent' to promissory estoppel liability and that the appellate court took a different approach, treating profitability as a part of the company's promise under § 90. The appellate court nevertheless affirmed the lower court's finding that the company's definition of the term, rather than the union's, established the applicable productivity target, quoting with approval the following passage from the lower court opinion:

This Court is loathe to exchange its own view of the parameters of profitability for that of the corporation. It is clear that there is little argument as to the production figures for the Youngstown mills—the controversy surrounds the interpretation of those figures. . . . Perhaps if this Court were being asked to interpret the word "profit" in a written contract between plaintiffs and defendant, some choice would have to be made. Given the oral nature of the alleged promises in the case at bar and the obvious ambiguity of the statements made, this Court finds that there is a very reasonable basis on which it can be said that Youngstown facilities were not profitable. Further, plaintiffs have made no showing of bad faith on the part of the Board of Directors in the Board's determination of profitability, nor have they given any grounds to suggest that defendant's definition of profitability is an unrealistic or unreasonable one.⁴⁴

⁴⁴ 631 F. 2d at 1278-79, quoting 492 F. Supp. at 7.

In sum, the district court found that there was ‘a very reasonable basis’ for the company’s interpretation of ‘profitability’ and further found that the union had failed to counter that position by showing it to be ‘unrealistic or unreasonable’ or offered in ‘bad faith.’ But the court did not explain why the union bore a burden that the company did not. Perhaps its thinking was influenced by the view that profitability was a ‘condition precedent’ to company liability, prompting it to assume that the union bore the burden of proving the condition’s fulfillment. Yet the court didn’t *say* that, and focused instead on the ‘oral nature of the alleged promises,’ suggesting somewhat cryptically that it might have reached a different conclusion if a ‘written contract’ were at stake. (Because we construe writings against the drafter but oral statements against the listener?) Less cryptic is the opening sentence of the analysis: ‘This Court is loathe to exchange its own view of the parameters of profitability for that of the corporation’. The sentiment is expressed with an air of conviction that is otherwise notably absent in the passage and may go a long way to explain why the court viewed the union’s challenge to the company’s version as an uphill and ultimately unsuccessful battle.

A seasoned labour lawyer would have smelled trouble the moment she encountered the quoted phrase, for it is a ritual incantation in cases challenging an employer’s right to close a business and decided under (if not exactly in accord with) the National Labor Relations Act. Thus, the NLRA prohibits all manner of retaliation against employees who decide to unionize, but there is a judicial carve-out for business closure in retaliation for a pro-union vote, despite the Supreme Court’s candid acknowledgement that such closure ‘is encompassed within the literal language’ of the governing provision.⁴⁵ The NLRA likewise requires an employer to bargain with a union representing its employees over ‘wages, hours, and other terms and conditions of employment,’ but there is a judicially created exception for an employer’s decision to close a plant despite the Court’s candid acknowledgement that the quoted statutory language ‘plainly cover[s] termination of employment which . . . necessarily results from closing an operation.’⁴⁶ To appreciate the vigor with which this

⁴⁵ *Textile Workers v. Darlington Manufacturing Co.*, 380 U.S. 263, 269 (1965).

⁴⁶ *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981)(internal quotation marks omitted).

particular American exceptionalism is policed, consider the following passage quoted with approval by the Supreme Court in the retaliatory closing case (the italics are mine):

But none of this can be taken to mean that an employer does not have the *absolute* right, *at all times*, to *permanently* close and go out of business, or to actually dispose of his business to another, *for whatever reason* he may choose, whether union animosity or *anything else*, and without his being thereby left subject to a remedial liability under the Labor Management Relations Act⁴⁷

Who *talks* like that? Certainly not American judges in any other setting and especially not in labour law cases when they are ruling in favor of *employee* rights, which are invariably described in apologetic and oh-so-carefully hedged terms.

If the unambiguous provisions of a federal statute can't resist a business closure override, a 'mere' state-based common law doctrine like promissory estoppel isn't likely to fare much better. But what is even more telling about the deployment of the 'won't exchange our own views for the company's' trope in *Local 1330* is its utter inapplicability to the facts at hand. The union was not, after all, asking the court to substitute the court's 'own views' of profitability for the views of responsible officials at U.S. Steel. It was asking instead that the court hold the company to the meaning of 'profitability' repeatedly and publicly proclaimed by its officers and agents, and to prevent its lawyers from substituting an entirely different meaning of the term despite the extensive and intended reliance of the workers on those earlier pronouncements.

There is a name for holding a party to out-of-court representations designed to mislead in this manner: equitable estoppel, the tried-and-true common law doctrine that, as noted earlier, was an important historical precursor to estoppel of the promissory variety. In its application, the court's 'own views' of the meaning of profitability would have been no more relevant than the court's own view of the 'real' age of a minor who passed a fake I.D. to a merchant and then attempted to invoke his youth to disaffirm the contract thus procured. Yet an American court hears the words 'plant closure' and finds itself chanting a robotic

⁴⁷ *Darlington*, 380 U.S. at 271 (quoting *NLRB v. New Madrid Manufacturing Co.*, 215 F.2d 908, 914 (8th Cir. 1954)).

mantra ('Must . . . Not . . . Substitute . . . My . . . Views . . .!'), drawn nigh irresistibly to an all too predictable result, never mind the facts let alone the consequences.